92-577

Supreme Court, U.S.
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No. _____ .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EMIL DOPYERA, ET AL.,
Petitioners,
v.
TEXAS STATE DEPARTMENT OF
HIGHWAYS AND PUBLIC TRANSPORTATION,
Respontent.

Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in the Petition for Writ of Certiorari are:

1. Whether the State of Texas has, under the Texas Tort Claims Act, waived its sovereign immunity and consented to a federal maritime cause of action in state court.

2. Whether federal maritime comparative negligence law preempts Texas contributory negligence law in a maritime case brought against the State of Texas in state court.

3. Whether the State of Texas is able to limit damages by applying Texas state law which conflicts with federal maritime law.

4. Whether uniformity of federal maritime law will be destroyed if each state, through individual state tort claims acts, is allowed to limit its waiver of sovereign immunity.

RULE 29.1 LIST

Petitioner, Classic Yacht Charters, has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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NO. _____

IN THE

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OCTOBER TERM, 1992

EMIL DOPYERA, ET AL.,
Petitioners,

v.

TEXAS STATE DEPARTMENT OF
HIGHWAYS AND PUBLIC TRANSPORTATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Emil Dopyera, Susan Dopyera and Classic Yacht Charters, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas.

OPINIONS BELOW

The opinion of the Supreme Court of Texas has been reported in *State Dept. of Highways v. Dopyera*, 35 Tex. Sup. Ct. J. No. 35B (July 1, 1992) is reprinted in the

appendix (p. 1a.)[1]. The opinion of the Court of Appeals for the Eighth Judicial District of Texas is reported in *State Dept. of Highways v. Dopyera*, 799 S.W.2d 469 (Tex. App.--El Paso 1990), and is reprinted in the appendix (p. 9a.).

JURISDICTION

The judgment and opinion of the Supreme Court of Texas was entered on July 1, 1992. The jurisdiction of this Honorable Court to review said judgment and opinion is invoked pursuant to 28 U.S.C.A. § 1257(3).

STATUTORY PROVISIONS

The following statutory and constitutional provisions are reproduced verbatim in the appendix hereto. (ps. 16-20a)

U.S.C.A. Const. Art., III, § 2, cl. 1
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28 U.S.C.A. § 1333
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Tex. Civ. Prac. & Rem. Code Ann. § 101.021
Tex. Civ. Prac. & Rem. Code Ann. § 101.025

STATEMENT OF THE CASE

This case arises from a collision between a sailing vessel owned by Petitioner, Emil B. Dopyera and a drawbridge owned and operated by the Texas State Department of

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1. Reference to material contained in the appendix will hereinafter be referred to by appropriate number followed by the letter "a".

Highways and Public Transportation.[2] The Dopyeras alleged that the Department negligently operated and maintained the motor-driven bridge, and brought suit under the Texas Tort Claims Act ("TTCA")[3] (p. 21a.). Both Plaintiffs' original petition and notice letter provided notice that the action was based in maritime law, since it concerned damage to a vessel within navigable waters (p. 26a.). The State of Texas raised affirmative defenses of sovereign immunity and contributory negligence.

The trial was to a jury, which found the Dopyeras sixty percent (60%) at fault, the State of Texas forty percent (40%) at fault, and total damages of $130,000. The Dopyeras moved for judgment on the verdict seeking the application of federal maritime remedy of pure comparative negligence. The court applied the maritime rule and awarded the Dopyeras forty percent (40%) of the damages, or $52,000, plus interest and costs.

The State of Texas appealed, alleging that the trial court erred by basing its judgment on federal admiralty law when the case was tried under the Texas Tort Claims Act. The State alleged that Texas contributory negligence law should be applied and that the Dopyeras should not recover under the jury verdict due to the fact that the jury found them to be in excess of the fifty percent (50%) liability limit, which barred recovery under Tex. Civ. Prac. & Rem. Code Ann. § 33.001(a) (Vernon Supp. 1990) (ps. 18-19a.). However, the Court of Appeals held that federal maritime law of pure comparative negligence preempted the Texas

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2. While the case was pending on appeal the Legislature named the agency the Department of Transportation.

3. Tex. Civ. Prac. & Rem. Code § 101.001-.025, hereinafter referred to as "TTCA".

contributory negligence scheme and affirmed the lower court's application of pure comparative negligence to mitigate the amount of damages awarded to the Dopyeras (p. 15a.).

The State of Texas then sought review in the Supreme Court of Texas based on the Court of Appeal's rulings.

On July 1, 1992, the Supreme Court of Texas reversed the judgment of the Court of Appeals, holding that Texas had not waived its sovereign immunity to general maritime jurisdiction and was insulated from liability under the facts of the case. The court further held that Petitioners were bound by the express terms of the state's limited consent to be sued under the Texas Torts Claims Act. The State of Texas was free to limit damages and liability of the terms of its waiver, even if federal maritime law conflicted with the liability limitations of the Texas Tort Claims Act. The court reversed the judgment of the Court of Appeals and rendered judgment that the Petitioners take nothing (p. 8a.).

REASONS FOR GRANTING THE WRIT

PART I

1. Introduction: Dependent and Inadequate Grounds of Decision.

This Honorable Court has historically declined to review judgments of state courts which rest upon independent and adequate nonfederal grounds.[4] The reasons for this refusal are obvious. Indeed, while it is appropriately within the province of each state to prescribe the methods by which the appellate jurisdiction of its courts is invoked, as well as

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4. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 420 (1875); *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 311, 315 (1819).

the rules of practice to be applied in the exercise of that jurisdiction, this Honorable Court has consistently stated that the assertion of an issue governed by federal law, when plainly and reasonably made, will not be defeated under the name of local practice.[5]

The seemingly inconsistent, although fundamental, policies have prompted this Honorable Court to articulate various standards for determining the independence and adequacy of an asserted nonfederal ground of decision. These standards, although varied in language and direction, impart essentially one proposition: That the state ground of decision, the application of which rendered unnecessary the consideration of the federal issue, must be independent of said issue, as well as fairly and consistently applied.

The Supreme Court of Texas' holding does not meet the standard and, consequently, Petitioners seek review of the lower court's holding.

2. Whether Federal Maritime Jurisdiction Preempts Texas State Sovereign Immunity Is Itself A Federal Question.

As stated by the Texas Supreme Court in its holding in this case:

> "the threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law....We conclude that maritime law does not preempt state sovereign immunity in this cause." (p. 4a.).

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5. *Wright v. Georgia*, 373 U.S. 284, 289 (1963); *Staub v. Baxley*, 355 U.S. 313, 319 (1958); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Clearly, the Supreme Court of Texas did not question whether the presentation of the federal question was adequate at the trial court and court of appeals levels. Petitioner adequately and unquestionably presented the federal issue concerning application of federal maritime law to the courts of Texas. A review of the evidence presented to the lower courts strongly supports Petitioners' claim.

Respondent, the State of Texas, in its application for writ of error to the Supreme Court of Texas, alleged that Petitioner, benefitted from "lying behind the log" with regard to the issue of applying federal maritime law versus Texas state law at the trial of the case (p. 32-33a.). However, review of the record indicates that the conflict over the application of maritime law was heated throughout the trial. Though many discussions concerning the matter were off the record, pages 94 through 98 of the statement of facts reflect that an argument at the very beginning of the trial occurred between Petitioner's counsel, Mr. Terry P. Ayre, and the State of Texas' counsel, Mr. Don B. Morgan (ps. 34-37a.). Mr. Morgan insisted that *Welch v. Texas State Department of Highways*, 483 U.S. 468 (1987), mandated that Texas state law should apply in determining the damages. Mr. Ayre, however, insisted that, "this is an admiralty case ...I mean general maritime law takes precedence over any state law. We can't have 50 maritime states with different laws...." In addition, Mr. Ayre presented the court with copies of various cases to support his proposition. Despite its claims, the state itself argued throughout the trial that the maritime rules of the road, as codified in the United States Coast Guard regulations, governed the maneuverings of the Dopyeras' vessel and the drawbridge. Obviously, the trial court, by rendering judgment for Petitioners, was convinced this matter was governed by maritime law.

It is also quite clear that both the original petition and

the notice letter provided more than adequate notice that this action was based on maritime law, since it concerned damage to a vessel within navigable waters (ps. 21-28a.). Under Texas law, the purpose of the pleading is to give the opposing party enough information to enable him to prepare defense.[6] As the Court of Appeals noted, "the Dopyera's pleadings, which stated a case involved a 'lake', a 'vessel' operated in water, in a 'boat' appears sufficient to appraise Appellant [State of Texas] with a fair notice of the merits of this case so that Appellant had the opportunity to prepare an adequate maritime defense." (p. 13a.) A party may invoke jurisdiction in either state or federal court, and may achieve a sufficient pleading by making a simple statement of facts that the claim involves either an admiralty or maritime matter.[7] The Dopyeras' pleadings were clearly sufficient notice of the application of maritime law.

In its brief to the Court of Appeals, the State of Texas stated that, "This is not a maritime case as a matter of law because no cause of action in maritime arises under the Texas Tort Claims Act.... In the alternative, this cause is a maritime claim wherein admiralty law is applicable but which contains a void state law must be used to fill." (ps. 31-32a.) Clearly, the federal question of whether maritime law applied to the facts of this case was presented to the Court of Appeals. The Court of Appeals addressed the federal question by stating that:

> "Even though state law may be used to supplement maritime law when maritime law is silent on issue, or where there is a local

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6. *Reed v. Israel Nat'l Oil Co.*, 681 S.W.2d 228, 234 (Tex. App.--Houston [1st Dist.] 1984, no writ).

7. *Bodden v. Osgood*, 879 F. 2d 184 (5th Cir. 1989).

> matter at issue, state law may not be used when it would conflict with maritime law.[8] In light of the fact that the Texas Tort Claims Act does not contain a provision as to whether contributory negligence would bar or mitigate damages in a maritime action, maritime law governs. Contributory negligence will not act to completely bar recovery, but only is considered in the mitigation of damages."
> (p. 12a.)

Clearly, the federal question was timely and properly raised at the trial court, Court of Appeals, and the Supreme Court of Texas proceedings. Therefore, this court has jurisdiction to review the questions presented.

PART II

1. The Waiver of Sovereign Immunity Federal Question: Direct Conflict

The holding of the Texas Supreme Court that, "Texas has not waived its sovereign immunity to general maritime jurisdiction" conflicts directly with judicially interpreted federal court and federal court of appeals decisions.

The direct conflict with the federal court of appeals decision arises in light of a Fifth Circuit decision addressing the applicability of the Texas Tort Claims Act to maritime tort claims. It is well settled that the Eleventh Amendment grants sovereign immunity to the State of Texas and its instrumentalities and is applicable to an admiralty action. The state is free from a maritime tort claim, absent its

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8. Citing, *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

consent. However, the State of Texas has consented to claims in maritime tort against state governmental entities under the Texas Tort Claims Act. *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983). In *Kamani*, the court stated "clearly the State of Texas should properly have contemplated that when it consented to be sued for claims in tort, some of those claims would be in admiralty ... we have recognized the application of admiralty law to a claim authorized under a state tort claims act."[9] There is a direct conflict between the Texas Supreme Court's holding in the instant case and the *Kamani* holding.

Further, in *Mifsud v. Palisades Geophysical Institute*, 484 F. Supp. 159, 162 (S.D. Tex. 1980), the court, while noting that the Texas Tort Claims Act encompasses only negligence actions and that general maritime actions for unseaworthiness lie outside its scope, stated "to the extent the general maritime action is one for negligence, the State [Texas] has consented to be sued." Further, the court, "having found no language in the TTCA to the contrary", held that the liability created by the act encompasses general maritime negligence. Since the instant case is based on general maritime negligence, it is in direct conflict with the *Mifsud* holding.

2. Federal Preemption Question: Direct Conflict

The Supreme Court of Texas' preemption of federal maritime comparative negligence by applying Texas state contributory negligence law, is in direct conflict with applicable maritime jurisprudence, both as legislatively created and judicially interpreted by this Honorable Court.

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9. Citing *Kiesel v. State of Florida, Department of Natural Resources*, 479 F.2d 1261 (5th Cir. 1973).

Under Texas state law, where a plaintiff's contributory negligence exceeds fifty percent (50%), the recovery is barred (p. 19a.). However, the U.S. Supreme Court has held that the harsh rule of contributory negligence that wholly bars recovery is completely incompatible with admiralty law, allowing consideration of contributory negligence only in mitigation of damages.[10] This Court further stated that when state courts purport to enforce federally created rights, they must apply the contents of those rights as determined by the U.S. Supreme Court. The effect of contributory negligence upon a plaintiff's maritime rights is a matter of substance governed exclusively by maritime law. This maritime doctrine of pure comparative negligence applies to an action brought in state court arising out of a collision within navigable waters in the United States.[11]

Nothing is more fundamental in maritime law than the principle that contributory negligence does not operate as a complete bar to recovery. When two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault.[12]

Further, under 28 U.S.C.A. § 1333, the district courts of the United States were given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy where the common law is competent to

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10. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

11. *Intagliata v. Ship Owners and Merchants Tow Boat Co.*, 159 P.2d 1 (Cal. 1945).

12. *United States v. Reliable Transport Co.*, 421 U.S. 397 (1975).

give it (ps. 16-17a.). Indeed, while the saving to suitors clause allows state courts concurrent jurisdiction with regard to *in personam* maritime causes of action, the extent to which state law may be used to remedy maritime injuries is limited by the "so-called 'reverse-*Erie*' doctrine" which requires that the substantive remedies afforded by the states, conform to governing federal maritime standards.[13] The "saving to suitors" clause does not preserve statutorily created causes of action. Although state law may supplement maritime law when maritime law is silent, or a local matter is at issue, state law may not be applied where it would conflict with maritime law.[14] Indeed, in the instant case, the Court of Appeals noted that the conflict between federal admiralty law and Texas state law was addressed in *Young v. Kilroy*, 673 S.W.2d 236 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), where the court stated that "where there is a judicially created federal admiralty law rule on an issue, the court should look to the rule to resolve the matter and not to state jurisprudence."

The Fifth Circuit Court of Appeals also addressed maritime law and Texas state law issues in *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture, in a Cause of Salvage, Civil and Maritime*, 695 F.2d 893 (5th Cir. 1983). There, the court concluded that it doubted whether Texas state law was applicable to an admiralty situation, without any specific indication contained within the Texas statute itself. In *Platoro*, the State of Texas waived sovereign immunity with respect to the private salvage of an ancient sunken vessel off the coast of Texas. Later, in its *Kamani* decision, the court

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13. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1976).

14. *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 184 (5th Cir. 1986).

stated that "the clear thrust of the [*Platoro*] opinion is that once the state waives sovereign immunity in an admiralty case, then admiralty law applies." *Kamani*, 702 F.2d at 614. Although the waiver of immunity in *Platoro* involved a legislative waiver, since both *Kamani* and *Mifsud* have held that the TTCA applies to admiralty actions, federal admiralty law clearly applies where it conflicts with state law, as in the instant case.

It is clear that the Texas Supreme Court's holding in this case, that the state contributory negligence standard preempted federal maritime pure comparative negligence law, is in direct conflict with established maritime jurisprudence.

Further, there is a question presented as to whether the State of Texas is able to limit damages where the liability limitations of the Texas Tort Claims Act conflict with the general maritime law. The Supreme Court of Texas held that the state is free to limit damages in liability to the terms of its waiver of sovereign immunity, even if general maritime law conflicts with the liability limitations of the Texas Tort Claims Act (p. 7a.). The court relied on its prior decision in *Trinity River Authority v. Williams*, 689 S.W.2d 883 (Tex. 1985). In that case, plaintiff brought a maritime action against *Trinity River Authority* ("TRA"), a state political subdivision, under the Texas Tort Claims Act. The court held that sovereign immunity had been waived but in waiving sovereign immunity, the state is free to limit the terms of the consent to be sued. The court went on to hold that the state's liability was limited to the $100,000 cap under the Texas Tort Claims Act, regardless of whether state or federal law was applied. However, as Justice Ray pointed out in his dissent in *Trinity River Authority*, "the applicability of maritime law is significant because under maritime law, TRA's liability is not limited to $100,000. The majority seems to hold that the maritime law might apply; but even if

it does, the Texas Tort Claims Act still would limit the amount of damages recoverable against TRA to $100,000.00. In my opinion, maritime law governs this case entirely and it is not appropriate to apply a state law damage limitation to a properly pleaded and litigated federal cause of action."

In the instant case, the Texas Supreme Court's holding that Texas could limit the amount of damages in an admiralty case, directly conflicts with maritime jurisprudence requiring the preemption of state law by federal maritime law, where the statutes are in conflict.

3. A Plea For Uniformity

Of overriding importance to the development of maritime law in the United States has been a desire for uniformity. Article III, § 2 of the United States Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." Article I, § 8, confers upon the Congress, "power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or office thereof." It is a well-settled consequence of these provisions that Congress has the power to determine maritime law throughout the country. In the absence of some controlling statute, there is a body of general maritime law which constitutes part of our national law and applies to matters within the admiralty and maritime jurisdiction. This general system of maritime law existed when the Constitution was adopted and the declaration that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction" unquestionably referred to a system of law co-extensive with and operating

uniformly in the whole country.[15]

Despite its opinion in the instant case, the Supreme Court of Texas recognized the above-stated proposition in *Texaco Refining & Marketing, Inc., et al v. Estate of Dau Van Tran et al*, 808 S.W.2d 61 (Tex. 1991). The court stated "where applicable and properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. III, § 2, cl. 1."

As evidenced by the instant case, uniformity can be elusive. Petitioners respectfully request this Honorable Court to not only remedy the misapplications of maritime law in the instant case, but to provide guidance to the lower courts of this country on the questions presented. Indeed, if the question of the application of maritime law in a suit against a sovereign suit is to be determined by each of the individual states' tort claim acts, there could indeed be fifty (50) different comparative conflicts between individual state law and maritime law, effectively destroying any semblance of uniformity.

Further, it appears that the holding of the Supreme Court of Texas, that Texas has not waived its immunity and that Congress did not intend for maritime law to preempt state sovereign immunity, clearly denies a maritime claimant a remedy under maritime law.

Surely, the Supreme Court of Texas' disposition of the questions presented raises "novel questions as to the

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15. *Lottawanna*, 88 U.S. 588 (1874).

interplay of state and maritime law"[16] and is highly relevant in determining the degree in which state courts may supplement, modify or totally destroy, as in the instant case, rights which have been afforded by Congress and the federal judiciary.

CONCLUSION

For these reasons, Petitioners, Emil Dopyera, Susan Dopyera and Classic Yacht Charters, respectfully request that this Honorable Court grant its petition for writ of certiorari and proceed to the merits of the issues presented.

Respectfully submitted,

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16. *Cf., Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961).

APPENDIX A
IN THE SUPREME COURT OF TEXAS

No. D-0692

THE STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, PETITIONER

v.

EMIL DOPYERA, ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

OPINION

The issue in this case is whether federal maritime law preempts state sovereign immunity law to require application of maritime's pure comparative negligence principles to an accident at a state-operated drawbridge. The trial court awarded damages under the maritime rule and the court of appeals affirmed. The court of appeals apparently concluded the State of Texas had waived its sovereign immunity and that federal maritime law preempted state law. 799 S.W.2d 469. We hold the State has not waived its immunity and that Congress did not intend for maritime law to preempt a state's sovereign immunity law in this manner. We reverse the judgment of the lower courts and render judgment for the State.

The Dopyeras sued for property damage resulting from the collision of their charter yacht with a drawbridge owned and operated by the Texas State Department of Highways and Public Transportation.[1] The Dopyeras, alleging the Department negligently operated and maintained the motor-driven bridge, brought suit under the Texas Tort Claims Act.[2] The State raised affirmative defenses of sovereign immunity and contributory negligence.

Trial was to a jury, which found the Dopyeras 60% at fault, the State 40% at fault, and total damages of $130,000. The Dopyeras moved for judgment on the verdict, seeking for the first time application of the federal maritime remedy of pure comparative negligence. Texas law as expressed in its comparative responsibility statute provides that in a negligence action, a claimant may recover only if his percentage of responsibility is no more than 50 percent. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon Supp. 1991). The trial court applied the maritime rule and awarded the Dopyeras 40% of the damages, or $52,000, plus interest and costs. The court of appeals affirmed, concluding the State waived its immunity, the federal maritime remedy applied, and the Dopyeras' contributory negligence could only mitigate, not bar, the damage award. 799 S.W.2d 469.

Generally, admiralty jurisdiction extends to vessels on navigable waters, and any tort occurring on those waters and bearing a significant relationship to traditional maritime

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[1]While the case was pending on appeal the legislature renamed the agency the Department of Transportation.

[2]TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. Before codification as chapter 101 of the Civil Practice and Remedies Code, the Tort Claims Act was article 6252-19 of the Revised Civil Statutes.

activity is governed by maritime law. *McCormick v. United States*, 680 F.2d 345, 347 (5th Cir. 1982). A maritime tort claim may be brought in state court pursuant to the "saving to suitors" clause in 28 U.S.C. § 1333 (1986). *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223 (1986)(state courts are constrained by "reverse-*Erie* doctrine" which requires that substantive state remedies conform to federal maritime standards). If maritime interests are involved, there is a strong policy to apply uniform rules of maritime conduct and liability to promote and protect maritime commerce. *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

In the instant case, the court of appeals concluded that maritime law covered the Dopyeras' vessel operating in navigable waters, and that federal law preempted state law. Under federal maritime law's pure comparative negligence standard, when a vessel's captain and one or more other parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is allocated among the parties proportionately to their comparative degree of fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397,411 (1975). The court of appeals emphasized the need for a uniform and consistent maritime law system, and the incompatibility of Texas' comparative responsibility rule with admiralty's pure comparative rule.

The court of appeals erred by failing to give proper weight to the State's interest in its own sovereign immunity by concluding that federal law preempted the State's limitations on its consent to be sued. Congress has expressed no clear intent to abrogate state sovereign immunity and impose general maritime law on the states for property damage. Moreover, the State's limited waiver of immunity

under its Tort Claims Act permits imposition of only the state remedy, and does not allow the broader federal maritime remedy of pure comparative fault.

The threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law. While this is not an Eleventh Amendment case, the Supreme Court long ago addressed and resolved this issue in an Eleventh Amendment context. In *Ex parte New York, No. 1*, 256 U.S. 490 (1921), it was argued that the Eleventh Amendment's immunity refers only to suits "in law or equity," and that suits "in admiralty" could therefore be brought against the states. The Court rejected that argument, reasoning that the Eleventh Amendment is but a recognition of the fundamental principle that a state may not be sued without its consent and that admiralty and maritime jurisdiction was not exempt from that principle. *Ex parte New York, No. 1*, 256 U.S. 490, 497-99 (1921). Further, responding to the argument that allowing a state immunity would destroy the "symmetry and uniformity" of maritime law, the Court wrote:

> It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.
>
> *Id.* at 503.

Although state sovereign immunity is not absolute,[3] the Supreme Court has usually required a "clear statement" or "unequivocal expression" of intent to abrogate the immunity in a *statute*.[4] In the maritime law area, the Court held that the Jones Act[5] abrogated state sovereign immunity.[6] In the plurality and concurring opinions in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court held that, as to the Jones Act, a state retains sovereign immunity against suits by its own citizens in federal courts unless it has waived its immunity. The Court subsequently limited *Welch* to its Eleventh Amendment holding, indicating that the Jones Act still does abrogate state sovereign immunity.[7] All the preemption holdings involve intent expressed in a specific statute. There is no suggestion that the holding of *Ex parte New York No.*

---

[3]*See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)(congressional abrogation of state immunity, pursuant to commerce clause powers); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)(congressional abrogation of state immunity pursuant to enforcement power of section five of Fourteenth Amendment).

[4]*See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234,243 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973).

[5]46 U.S.C. App. § 688.

[6]In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that in the Jones Act language ("Any seaman who shall suffer personal injury in the course of his employment") Congress intended to abrogate state immunity as to seamen employed by or injured by a state.

[7]*Hilton v. South Carolina Public Railways Commission*, __U.S.__, 112 S.Ct. 560 (1991).

1, that general maritime law does *not* preempt, is not good law.

We conclude that maritime law does not preempt state sovereign immunity in this cause. First, this is a claim for property damage under general maritime law, *see Reliable Transfer*, 421 U.S. at 411, and not a statutory action for personal injury; the Dopyeras rely on no federal statute to support their claim. Since there is no statute with a clear expression of congressional intent to abrogate state sovereign immunity, we must not imply one. Second, the last Supreme Court opinion addressing the issue is *Ex parte New York, No. 1*, which held that general maritime law does not preempt state sovereign immunity.

The issue remains whether Texas itself waived immunity and consented to general maritime law jurisdiction in this cause. If this court concluded waiver was intended, the federal courts apparently would defer to that determination. *Welch*, 483 U.S. at 474 (opinion of Powell, J.). At least for purposes of Eleventh Amendment construction, the Supreme Court apparently requires the presence of an unequivocal expression before imposing a holding of waiver. *Port Authority Trans-Hudson Corp. v. Feeney*, 494 U.S __,__ 110 S.Ct. 1868, 1873 (1990) (Waiver provisions in state act must meet same unmistakably clear standard as Congress's expression of intent to abrogate Eleventh Amendment sovereign immunity). For the reasons that follow, we conclude that under applicable federal construction rules, Texas has not waived it sovereign immunity to general maritime jurisdiction, and the State's limited waiver of sovereign immunity, under state rules of construction, insulates it from liability under the facts of this cause.

Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:

> §101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage... proximately caused by ... the negligence of an employee...if: (A) the damage arises from the operation or use of... motor driven equipment; *and* (B) the employee would be personally liable ... *according to Texas law.*
>
> §101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
>
> TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.025 (emphasis added).

This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law. Once the plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause of action against the State, then he also is bound by the limitations and remedies provided in the statute. *See Kamani v. Port of Houston*, 702 F.2d 612, 616(5th Cir. 1983); *see also Riggle v. State of California*, 577 F.2d 579, 585-86 (9th Cir. 1978). The state is free to limit damages and liability to the terms of its waiver of sovereign immunity, even if general maritime law conflicts with the liability limitations of the Tort Claims Act. *Trinity River Authority v. Williams*, 689 S.W.2d 883, 886(Tex. 1985). In a cause of action against the State of Texas for property damage resulting from

the operation of motor-driven equipment owned and operated by the State, the relief available is limited to that provided by Texas law, and in accordance with Texas' system for apportionment of fault. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon Supp. 1991).

We hold that the Dopyeras are bound by the express terms of the sovereign's limited consent to be sued. We reverse the judgment of the court of appeals and render judgment that the Dopyeras take nothing.

Bob Gammage,
Justice

OPINION DELIVERED: July 1, 1992.

APPENDIX B

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION	)	**No. 08-90-00087-CV**
Appellant,	)	**Appeal from 122nd District Court**
v.	)	
EMIL DOPYERA, et al.,	)	**Galveston County, Texas**
Appellees.	)	**(TC# 85-CV1586)**

OPINION

In a suit for property damages over the collision of a yacht with a drawbridge, the jury verdict was favorable to the yacht owner. We affirm.

The Dopyeras, Appellees, were owners and operators of the charter yacht, the "Rachel B. Jackson." In June 1985, the yacht collided with the Kemah drawbridge which was owned and operated by the State of Texas, through its agent, the State Department of Highways and Public Transportation, Appellant. The Kemah drawbridge, a motor-driven bridge, spanned the Clear Lake Channel and was being lowered at the time of the collision. Comparative negligence issues were submitted to the jury which placed sixty percent (60%) of the fault on the Dopyeras and forty percent (40%) of the fault on the operator of the drawbridge, the State Department of Highways and Transportation. Damage to the yacht was

found to be $130,000.00. Applying the comparative negligence findings of the jury, the trial judge entered judgment for the Appellees in the amount of $52,000.00 plus interest and costs.

Point of Error No. One asserts challenges that the trial court erred by basing its judgment on federal admiralty law when the case was tried under the Texas Tort Claims Act ("TTCA").

Point of Error No. Two asserts that the trial court erred in applying maritime pure comparative negligence law to the jury findings tried under the TTCA and by doing so the trial court created two classes of plaintiffs.

Addressing the first point of error, it must be noted that if Texas contributory negligence law is applied, the Dopyeras would not recover under the jury verdict due to the fact that the jury found Appellees to be in excess of the fifty percent (50%) liability limit under Tex.Civ.Prac.& Rem.Code Ann. §33.001(a)(Vernon Supp. 1990). This, however, is a maritime tort action where a governmental unit of the State of Texas was sued under the TTCA. Tex.Civ.Prac.&Rem.Code Ann. §101.021 (Vernon 1986). Under maritime law, unlike the recovery allowed under the Texas contributory negligence scheme, a plaintiff's negligence claim is not an absolute bar to recovery and a comparative negligence standard is implemented to mitigate the amount of damages awarded to the plaintiff. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 258-59, 61 L.Ed.2d 521, 526, 99 S.Ct. 2753 (1979), reh. denied, 444 889 (1980).

The TTCA provides that a governmental unit in the state is liable for property damage arising from the operation or use of "motor-driven equipment." Tex. Civ. Prac. &

Rem. Code Ann. §101.021. If Section 101.021 is applicable, the TTCA provides a limited waiver of sovereign immunity which permits a claimant to bring a lawsuit and subject a governmental unit of the State of Texas to liability for claims specified in the TTCA. Tex.Civ.Prac.& Rem.Code Ann. §§101.021, 101.025 (Vernon 1986). Although the TTCA does encompass a property damage claim arising from the operation of a motor-driven vehicle, such as the motor-driven bridge in the case at hand, the liability for an accident arising from a maritime accident is not specified in the chapter regarding tort claims under Texas law. See Tex.Civ.Prac.& Rem.Code Ann. §101.023 (Vernon 1986). Thus, once Texas waived its sovereign immunity pursuant to the TTCA in an admiralty case, then maritime law and remedies apply. *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613-14 (5th Cir. 1983); see also *Young v. Kilroy Oil Company of Texas*, 673 S.W.2d 236, 244 (Tex.App.--Houston[1st Dist.] 1984, writ ref'd n.r.e.)(where there is a judicially established federal administrative rule on issue at hand, the court should look to federal rule versus state jurisdiction to resolve the matter).

The general rule is that any tort which occurs in navigable waters of the United States falls within admiralty jurisdiction and maritime law applies. *McCormick v. United States*, 680 F.2d 345, 347 (5th Cir. 1982). The yacht owned by Appellees was operating in navigable waters, therefore admiralty jurisdiction applies. The maritime cause of action may be brought either in state court pursuant to the "saving to suiters" clause or in federal court. 28 U.S.C.S. §1333 (1986). Generally, if a maritime tort occurs, then maritime law governs regarding the rights and liabilities of the parties, regardless of whether the case could be brought in either a federal or state forum. 2 C.J.S. Admiralty §70, at 173-74 (1972). Substantive remedies, however, afforded by the states must conform to the governing federal maritime

standards. This remedy is called the "reverse-Erie" doctrine which requires the application of state law to conform to the governing federal law. *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307, 316 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140 (1988). Thus, even though state law may be used to supplement maritime law when maritime law is silent on an issue, or where there is a local matter in issue, state law may not be used when it would conflict with maritime law. See *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307, 316. In the light of the fact that the TTCA does not contain a provision as to whether contributory negligence would bar or mitigate damages in a maritime action, maritime law governs in that contributory negligence will not act to completely bar recovery, but only is considered in the mitigation of damages.

In the United States Supreme Court case of *Pope & Talbot, Inc. v. Hawn* where a person was hurt on navigable waters within the state of Pennsylvania, it was urged that state law should apply which would be effect bar recovery for the injured person's contributory negligence. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1953). The Supreme Court held that the harsh rule of contributory negligence that wholly barred recovery was completely incompatible with admiralty law which allows such consideration of contributory negligence only in mitigation of damages. 346 U.S. at 408-10, 98 L.Ed. at 150-51, 74 S.Ct. at 202. Furthermore, the Supreme Court stated that when state courts purport to enforce federally created rights, they must apply the contents of those rights as determined by the Supreme Court. The effect of contributory negligence upon a plaintiff's maritime rights is a matter of substance governed exclusively by maritime law. 346 U.S. at 409-10, 98 L.Ed. at 151, 74 S.Ct. at 202. It must be noted that the case at hand does not pertain to a state employee suing the state in which a worker's compensation

claim is at issue. In the present action, the claim involves motor-driven equipment which falls squarely within the TTCA, thus the *Lyons* and *Welch* case prodigies are inapplicable to the instant action. *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468, 97 L.Ed.2d 389, 107 S.Ct. 2941 (1987); *Welch v. State Department of Highways and Public Transportation*, 780 F.2d 1268 (5th Cir. 1986)(en banc); *Welch v. State Department of Highways and Public Transportation*, 739 F.2d 1034 (5th Cir. 1984), reh. granted, 780 D.2d 1268 (5th Cir. 1986); *Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex.App.--Houston[14th Dist.] 1976, writ ref'd n.r.e.).

Appellant also argues that Appellees waived all rights to admiralty jurisdiction due to Appellees' alleged failure to correctly plead admiralty jurisdiction. Appellees may invoke jurisdiction in either state or federal court and may achieve a sufficient pleading by making a simple statement of facts that the claim involves either an admiralty or maritime matter. See generally *Bodden v. Osgood*, 879 F.2d 184 (5th Cir. 1989). Thus Appellees' pleadings, which stated that the case involved a "lake," a "vessel" operated in water, and a "boat" appear sufficient to appraise Appellant with fair notice of the merits of the case so that Appellant had the opportunity to prepare an adequate maritime defense.

Addressing Appellant's second point of error, Appellant alleges that by applying maritime law to the case at hand, two classes of plaintiffs were created which is contrary to what the Texas legislature intended for the TTCA. In view of the fact that federal maritime comparative negligence law preempts Texas contributory negligence law, the issue of whether two classes of plaintiffs were created by the application of maritime law to torts committed on the

high seas and navigable water is not a practicable argument for this Court to address.

Points of Error Nos. One and Two are overruled.

We affirm the judgment of the trial court.

October 31, 1990

/s/Larry Fuller
LARRY FULLER, Justice

Before Panel No. 2
Osborn, C.J.,
Fuller and Koehler, JJ.

(Publish)

APPENDIX C
COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,	) No. 08-90-00087-CV
Appellant,	) Appeal from 122nd) District Court
v.	)
EMIL DOPYERA, et al.,	) Galveston County,) Texas
Appellees.	) (TC# 85-CV1586)

JUDGMENT

This cause came on to be heard on the record of the court below, and the same thing considered, and it being the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed by the Court that the judgment be in all things affirmed. It further appearing to the Court that no cost are due this Court by reason of the appeal herein, no further order is made with respect thereto, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 31ST DAY OF OCTOBER, 1990.

/s/
Larry Fuller, Justice

Before Panel No. 2
Osborn, C.J., Fuller and Koehler,JJ.

APPENDIX D

Statutory Provisions

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

June 25, 1948, c. 646, 62 Stat. 929.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

Tex. Civ. Prac. & Rem. Code Ann. § 101.002. Short Title

This chapter may be cited as the Texas Tort Claims Act.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Tex. Civ. Prac. & Rem. Code Ann. § 101.003. Remedies Additional

The remedies authorized by this chapter are in addition to any other legal remedies.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 985.

Tex. Civ. Prac. & Rem. Code Ann. § 101.021. Governmental Liability

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the

negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Tex. Civ. Prac. & Rem. Code Ann. § 101.025. Waiver of Governmental Immunity; Permission to Sue

(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Tex. Civ. Prac. & Rem. Code Ann. § 33.001. Comparative Responsibility

(a) In an action to recover damages for negligence resulting in personal injury, property damage, or death or an action for products liability grounded in negligence, a

claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.

(b) In an action to recover damages for personal injury, property damage, or death in which at least one defendant is found liable on a basis of strict tort liability, strict products liability, or breach of warranty under Chapter 2, Business & Commerce Code, a claimant may recover damages only if his percentage of responsibility is less than 60 percent.

(c) In an action in which a claimant seeks damages for harm other than personal injury, property damage, or death, arising out of any action grounded in negligence, including but not limited to negligence relating to any professional services rendered by an architect, attorney, certified public accountant, real estate broker or agent, or engineer licensed by this state, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.04, eff. Sept. 2, 1987.

U.S.C.A. Const. Art. III § 2, cl. 1.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a

State and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S.C.A. Const. Art. I § 8, cl. 18.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S.C.A. Const. Amend. XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX E
NO. 85 CV 1586

EMIL DOPYERA, SUSAN DOPYERA AND CLASSIC YACHT CHARTERS X IN THE DISTRICT COURT OF

VS. X GALVESTON COUNTY, TEXAS

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION X 122ND JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, EMIL DOPYERA, SUSAN DOPYERA and CLASSIC YACHT CHARTERS, Plaintiffs, complaining of State Department of Highways and Public Transportation, hereinafter called Defendant, and for cause of action would respectfully show unto the Court the following:

I.

Plaintiffs are residents of Harris County, Texas.

Defendant is a resident of Travis County, Texas, where service of process may be had upon Defendant by serving Mark Goode, Engineering Director, DeWitt Greer State Highway Department Building, 11th at Brazos, Austin, Texas. Service is requested at this time.

II.

On or about June 11, 1985, at approximately 9:00 a.m., Plaintiffs were operating their sixty-seven foot (67') charter boat, the "Rachel B. Jackson", in a careful and prudent manner in the Clear Lake Channel, approaching highway 146 and the Kemah Bridge which spanned Clear Lake Channel. Plaintiff's charter boat violently and unexpectedly struck the lowered draw bridge, owned, operated and maintained by Defendant.

III.

On the occasion in question Defendant operated the draw bridge in a negligent manner because Defendant violated the duty which he owed Plaintiffs to exercise ordinary care in the operation on the draw bridge in the following particulars:

(a) In failing to adequately warn of the bridge being lowered;

(b) Failing to inspect the bridge in question;

(c) Failing to employ competent persons to man the bridge and monitor the draw works;

(d) Failing to properly coordinate the bridge opening with the construction of a new bridge near by;

(e) Failing to properly maintain the bridge and its draw works and air horn signal device;

(f) Failing to warn the public users of the waterway that the bridge and its draw works were in dangerous and altered form;

(g) Failing to conform to the long established custom in signaling or warning mariners of the empending lowering or movement of the bridge.

Each of such acts and omissions, singularly or in combination with others, constituted negligence which proximately caused the collision and the injuries Plaintiffs suffered.

IV.

As a direct and proximate result of the negligence of Defendant, the head stay of the "Rachel B. Jackson" hit the drawbridge and broke the fore top mast, causing the center section to fall to the deck. As a result, the "Rachel B. Jackson" sustained numerous damages necessitating extensive repair work.

V.

As a result of the injuries sustained by Plaintiffs in the collision made the basis of this suit, Plaintiffs have suffered the following items of damage:

(a) Cost of repairs;
(b) Lost profits;
(c) Loss of use and enjoyment.

The "Rachel B. Jackson" was severely damaged, the necessary and reasonable costs of repairing said vessel and restoring it to its condition immediately prior to the accident is TWENTY SEVEN THOUSAND NINETY NINE DOLLARS ($27,099.00). For Plaintiffs' resulting loss and damage in the sum of TWENTY SEVEN THOUSAND NINETY NINE DOLLARS ($27,099.00), Plaintiffs hereby sue.

As a further result of the collision made the basis of this lawsuit, Plaintiffs were prevented from operating their charter boat business for an extended period of time. The

net loss to Plaintiffs has yet to be determined because it is an ongoing problem.

As a proximate result of the collision made the basis of this lawsuit, Plaintiffs lost the use and enjoyment of the vessel for an extended period of time while the damage was being repaired. The net loss to Plaintiffs for such loss of use and enjoyment, has yet to be determined because it is an ongoing problem.

IV.

The negligence of the Defendant as aforesaid was of such a character as to make Defendant guilty of gross negligence. Defendant's actions involve such entire want of care as could have resulted from a conscious indifference to the rights or welfare of Plaintiffs, and Plaintiffs hereby sue for exemplary damages.

VII.

By reason of all the above and foregoing, Plaintiffs have suffered losses and damages in an amount in excess of the minimum jurisdictional limits of this Court for which Plaintiffs hereby sue.

WHEREFORE, Plaintiffs request that Defendant State Department of Highways and Public Transportation be cited to appear and answer and that on final hearing Plaintiffs have judgment against said Defendant for an amount in excess of the minimum jurisdictional limits of this Court together with prejudgment interest at the legal rate computed from the date of the collision made the basis of this lawsuit, interest after judgment at the legal rate, costs of court and for such other

and further relief, at law or in equity to which Plaintiffs are justly entitled.

Respectfully submitted,

CHERRY, AYRE LAW OFFICES

/s/ T P Ayre
TERRY P. AYRE (TBN 01470000)
ATTORNEY FOR PLAINTIFF
711 W. Bay Area Blvd., Suite 500
Webster, Texas 77598
713/488-6139

APPENDIX F
Texas Tort Claim Notice Letter
LAW OFFICES OF DOUG CHERRY, P.C.

Doug Cherry
Board Certified Specialist
Personal Injury Trial
Terry P. Ayre
Jeffrey R Bale
Barry Evans

711 W. Bay Area Blvd.
Suite 500, Bay Plaza
Webster, Texas 77591
(713) 488-6139

2525 Calder Avenue
Beaumont, Texas 77712
(409) 833-4331

July 31, 1985

State Highway Department
Highways and Public Transportation
Highway Building
Austin, TX 78711

RE: CLAIM ON BEHALF OF EMIL DOPYERA, et ux and CLASSIC YACHT CHARTERS

The undersigned presents this notice of injury and claim for damages under the Texas Tort Claims Act.

I.

The injured parties are EMIL DOPYERA, et ux who are residents of Houston, Harris County, Texas and CLASSIC YACHT CHARTERS.

II.

The occurrence giving rise to this claim took place at approximately 0855 hours, June 11, 1985 at the KEMAH BRIDGE, CLEAR LAKE CHANNEL, HIGHWAY 146.

III.

The incident occurred when claimants, while operating their sixty-seven (67) foot vessel, struck the lowered draw bridge. Claimants had no warning that the bridge was being lowered, was lowered or about to be lowered. No signal was ever observed or heard by claimants relative to the bridge being in the down position.

IV.

The occurrence giving rise to this claim was a direct and proximate cause and result of the negligence of the State Highway Department in:

1) failing to adequately warn of the bridge being lowered;

2) failing to inspect the bridge in question;

3) failing to employ competent persons to man the bridge and monitor the draw works:

4) failing to properly coordinate the bridge opening with the construction going on with the new bridge;

5) failing to properly maintain the bridge and its draw works and air horn signal device;

6) failing to warn the public users of the waterway that the bridge and its draw works were in dangerous and altered form;

7) failing to conform to the long-established custom in signaling or warning mariners of the impending lowering or movement of the bridge.

V.

As a result of the foregoing, claimants' vessel was severely damaged and has necessitated and will require extensive repairs.

In addition thereto, a passenger on board the subject vessel, Mrs. J. J. Johnson, 1 Mockingbird Circle, Houston, Texas, was struck on the head and injured when the vessel's fore topmast fell.

In addition thereto, claimants have suffered and will continue to suffer loss of business and profits because of the vessel's time out of service to effect the necessary repairs.

Respectfully submitted,

CHERRY & AYRE

BY: /s/ TP Ayre
TERRY P. AYRE
SB# 01470000

ATTORNEYS FOR EMIL DOPYERA, et ux
SUSAN DOPYERA
CLASSIC YACHT CHARTERS

APPENDIX G
No. D-0692

IN THE

SUPREME COURT OF TEXAS

STATE DEPARTMENT OF HIGHWAYS AND
PUBLIC TRANSPORTATION,
Petitioner

V.

EMIL DOPYERA, ET AL.,
Respondents

On Appeal from the 122nd Judicial District Court
of Galveston County, Texas and the
Court of Appeals for the
Eighth Supreme Judicial District of Texas

APPLICATION FOR WRIT OF ERROR

Respectfully submitted,

DAN MORALES
ATTORNEY GENERAL OF TEXAS

WILL PRYOR
FIRST ASSISTANT
ATTORNEY GENERAL

MARY F. KELLER
EXECUTIVE ASSISTANT
ATTORNEY GENERAL

RICHARD D. NAYLOR
ASSISTANT ATTORNEY GENERAL
CHIEF, HIGHWAY DIVISION

CYNTHIA L. HOOPER
ASSISTANT ATTORNEY GENERAL

STATEMENT OF FACTS

Emil Dopyera was the owner and operator of the yacht RACHEL B. JACKSON in June, 1985. On June 5, 1985, the RACHEL B. JACKSON, while in the Seabrook/Kemah Channel collided with the draw bridge which spans that channel. After a trial on the merits, the jury placed sixty (60%) percent of the fault of that collision upon Emil Dopyera and forty (40%) percent upon the operator of the bridge, the State Department of Highways and Public Transportation. The jury found property damage to the vessel in the amount of $130,000. Applying the pure comparative negligence rule of maritime law, the trial court entered judgment on the verdict for the Plaintiffs and awarded them forty (40%) percent of the $130,000 in damages awarded by the jury or $52,000, together with interest and costs. From that judgment the State Department of Highways and Public Transportation perfected its appeal.

SUMMARY OF THE ARGUMENT

This is not a maritime case as a matter of law. No cause of action in maritime arises under the Texas Tort Claims Act, Chapter 101, Tex. Civ. Prac. & Rem. Code Ann. (hereinafter referred to as "the TTCA", "the Act" or "the statute") which is the exclusive avenue for a Texas citizen to assert a tort claim against the State. Therefore, while the facts might give rise to a maritime claim in federal or state court against another defendant, it is not available against the State. The identity of the defendant Plaintiff selected precludes any cause of action for negligence other than those expressly set forth in the TTCA.

In the alternative, this cause is a maritime claim wherein admiralty law is applicable, but which contains a

void which state law must be used to fill. The void in admiralty law is the absence of permission to sue a governmental unit that is protected by the doctrine of sovereign immunity. No provision of admiralty law permits a court to exercise jurisdiction over a defendant so protected. The TTCA provides the only waiver of sovereign immunity from suit in tort available by a statute of general application. The law is clear that if a court sitting in admiralty adopts the benefits of a state statute, it must also accept the limits. No cause of action is available without the waivers of sovereign immunity available pursuant to the TTCA. While the action is given viability by the Act, it is also mandatory that Texas law control as that is a limitation specified within the Act, without which the benefit of waiver of governmental immunity to suit and liability is not available. E.g., T.N.T. Marine Service v. Weaver Shipyards, 702 F.2d 585 (5th Cir. 1985). As the Dopyeras claim to have gone to trial on a maritime claim, they should be well aware that they had no right to a jury. The Dopyeras' blatant disregard for this core premise of admiralty law should act to waive any admiralty claim they may have had.

D. It is Manifestly Unjust for the Dopyeras to Benefit From Lying Behind the Log

This cause was commenced and tried as a TTCA case. If maritime law is applicable, it is inequitable for the Dopyeras to benefit from lying behind the log while the State was deprived of fair notice. The cause should be reversed and remanded for new trial in the interest of justice.

The Dopyeras initiated this cause of action, as required by the TTCA, with a notice letter meeting all the specifications of the Act. (See Appendix 1.) Their pleadings set forth the necessary facts to state a claim and support a judgment under the TTCA. The State finds it curious that by

two omissions the Dopyeras' pleadings and the issues submitted are completely generic in terms of stating either the TTCA or admiralty claim.

APPENDIX H
Dopyera, et al v. State Dept. of Highways
STATEMENT OF FACTS - 122ND DISTRICT COURT
GALVESTON CO. TEXAS

MR. AYRE: Yes, Your Honor. Charters were actually used on this boat every day as a business venture. And that's what we want to prove up, is loss of his charter hire, loss of revenue, and loss of business because of the damage done to the boat.

MR. MORGAN: May it please the Court, it's a chattel. And as I understand the law of damages to chattel in a negligence action, he can prove either the market value of the vessel immediately before and immediately after the damages, or the cost of repair, at his option. But loss of business, as I understand it, is not part of the claim for damages for loss of a chattel.

MR. AYRE: This is an admiralty case. We have the cases right here. If that were the case, there wouldn't be any maritime industry in the Country if you couldn't get loss of use for a damaged boat. And the cases are legion. That's hornbook law.

MR. AYRE: We could go on to something else while the Court reads that and come back to it.

MR. MORGAN: I don't know about the cases that Mr. Ayre is reciting to you; but unless he can show the Court a case that shows the State of Texas is subject to the general maritime law, I don't think they are. The case of State of Texas v. Welch, decided by the United States Supreme Court, involved an employee injured on the ferry down here. The Highway Department sued both the Highway Department and another Defendant under the Jones

Act. And that case was taken up to the U.S. Supreme Court. And they say said, no, the State is not liable under the Jones Act. If it's analogous in terms of general maritime law, you have a serious question as to whether or not it applies to the State.

THE COURT: When the State doesn't apply to maritime, what law would apply?

MR. MORGAN: Texas law.

THE COURT: What law?

MR. MORGAN: I don't know whether or not Texas has any particular statute that speaks to damages to a vessel. All I am suggesting is that Texas law for damage to a chattel is either cost to repair, or market value before or after the damage, at the plaintiff's option. If the Court finds that the general maritime law applies to the State of Texas, Mr. Ayre is a very versed lawyer in maritime law, and I am not. I can't represent to the Court that general maritime law is not as he suggested this. All I am suggesting is that the State is not, under the Welch case, subject to the Jones Act. That is a specific maritime federal statute.

MR. AYRE: No problem. I agree with that. If a bridge collapses while a banana boat is coming into Galveston harbor, the vessel owner is entitled, unquestionably, for damages sustained while the boat is getting repaired and loss of use. I mean general maritime takes precedence over any state law. We can't have 50 maritime states with different laws. We wouldn't have any commerce.

MR. MORGAN: The United State Supreme Court has said that we can have that with regard to the application of the Jones Act to the states. And I am not arguing with Mr. Ayre a bit, if he will show the Court or me the authority, obviously not me, but show you, the Court, any case in which the State has been held liable for down time for a vessel. I don't know of any such case. Maybe Mr. Ayre has one.

MR. AYRE: I think if the Court reads what we have presented, and we can go on to another subject and argue about this later, I never thought it was ever controverted. That we carved out a different set of maritime rules for each and every state, I have never heard of that. It's got to be uniform. And that's why admiralty law is the same everywhere. It takes precedence. It's the same in New York as it is in Virginia and the same Mississippi as in Florida.

MR. MORGAN: It is as to private parties. But insofar as the State of Texas is concerned, the Welch case specifically holds that Texas is not subject to the Jones Act. That covers injuries to seamen. I am not speaking to a case I know about as to damages to property. But under Texas law, the only application that I know of to sue the sovereign for damages relies upon a general Texas common law statute. And as I understand damages under chattel in Texas law is as I stated it, and I don't think the general maritime law applies to the State of Texas.

THE COURT: It's pretty obvious this issue is not going to be decided until we take a little look at something because neither side has done that and the Court hasn't. We will stop it until you show something I would like to see.

MR. AYRE: I think it's important enough an issue that we resolve it because that's a big portion of his damages.

THE COURT: All right. My question at this point is can we move on right now, or do we need send the Jury out and decide this issue? I think we ought to decide this right now. And, so, I am going recess the Jury.

Jurors, please report back to the jury room at 3:00 o'clock. I have a matter on this I have got to take up outside your presence. I am sorry. You did get to listen to 20 minutes worth of testimony, anyway.
(The following proceeding occurred in chambers:)

THE COURT: We are entering into a stipulation.

MR. AYRE: Come now the parties and have agreed to try by consent the damage issue.

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No. 92-577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EMIL DOPYERA, ET AL.,

Peitioners,

v.

TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Respondent.

Brief in Opposition by Respondent, Texas State Department of Highways and Public Transportation

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a decision by the Texas Supreme Court applying state law, the Texas Tort Claims Act, to preclude a federal admiralty claim in Texas state court on grounds of state sovereign immunity, raises a federal question which this Court may hear.

It is the contention of the State of Texas that there are no federal questions presented by Petitioners' Petition for Writ of Certiorari.

LIST OF PARTIES

(1) Texas Department of Transportation, formerly State Department of Highways and Public Transportation

(2) E...il Dopyera

(3) Susan Dopyera

(4) Classic Yacht Charters

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OCTOBER TERM, 1992

EMIL DOPYERA, ET AL.,

Petitioners,

v.

TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, formerly the Texas State Department of Highways and Public Transportation, now the Texas Department of Transportation, respectfully prays that Petitioners' Petition for Writ of Certiorari be denied for Want of Jurisdiction.

OPINIONS BELOW

Respondent agrees with Petitioners' reproduction of the opinions below. For the convenience of the Court, the opinion of the Texas Supreme Court in State Department of Highways

v. Dopyera, 35 Tex. Sup. Ct. J. No. 35B (July 1, 1992) is also reproduced in the appendix attached to this Brief in Opposition.

NO JURISDICTION

This case presents no federal question. As explained in the argument of this Brief in Opposition, this case simply involves an interpretation of a Texas state statute by the Texas Supreme Court. Additionally, as explained in the argument of this Brief in Opposition, no conflict with federal authority involving a federal question is presented by this case. Furthermore, since no federal question exists, no conflict with federal authority involving a federal question can exist. Lastly, this case presents no novel procedural or constitutional questions.

Therefore, this Honorable Supreme Court of the United States has no jurisdiction under 28 U.S.C.A. Section 1257(a), formerly 28 U.S.C.A. Section 1257(3), or under Rule 10 of the Rules of the Supreme Court of the United States. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

STATUTORY PROVISIONS

Respondent agrees with Petitioners' reproduction of the applicable statutory provisions with the exception of Petitioners' Appendix D, which is a reproduction of previous 28 U.S.C.A. Section 1257 (1948), instead of the recodified 28 U.S.C.A. Section 1257 (1988).

STATEMENT OF THE CASE

Respondent agrees with Petitioners' Statement of the Case with two exceptions. Firstly, Petitioner states in the third sentence of the first paragraph the following:

> Both Plaintiff's original petition and notice letter provided notice that the action was based in

> maritime law, since it concerned damage to a vessel within navigable waters (p. 26a.).

Respondent specifically disagrees with this statement.

Secondly, in the first sentence of the last paragraph of Petitioners' statement of the case Petitioner states the following:

> "On July 1, 1992, the Supreme Court of Texas reversed the judgment of the Court of Appeals, holding that Texas had not waived its sovereign immunity to general maritime jurisdiction and was insulated from liability under the facts of the case."

Respondent would suggest that the following is a more accurate representation of the Statement of the Case as follows:

> On July 1, 1992, the Supreme Court of Texas reversed the judgment of the Court of Appeals, holding that Texas had not waived its sovereign immunity to general maritime jurisdiction, and was insulated from liability **pursuant to the Texas Tort Claims Act as applied to** the facts of the case.

Respondent agrees with the balance of Petitioners' Statement of the Case.

SUMMARY OF THE ARGUMENT

In the case at bar, Petitioners' cause of action involves a maritime injury brought pursuant to the Texas Tort Claims Act. The Petitioners attempt to apply pure comparative negligence principles of general maritime law in place of comparative responsibility principles of Texas state law. The reason is simple. In the event pure comparative negligence principles are applied, Petitioners recover. In the event comparative

responsibility negligence principles are applied, Petitioners do not recover.

The defendant at trial in this case, Respondent, the State of Texas, enjoys the protection of sovereign immunity. Although the State of Texas can waive sovereign immunity protection, in doing so the State of Texas is free to limit the terms of the consent to be sued. In the case at bar, the State of Texas, through the state statute of the Texas Tort Claims Act, has waived sovereign immunity to the extent set forth in the statute.

Unless a federal statute exists that specifically abrogates state sovereign immunity, state sovereign immunity bars federal admiralty law. In the case at bar, no such preemptive federal statute exists. Furthermore, the United States Supreme Court case of Ex parte New York, No. 1, 256 U.S. 490, 497-499, 41 S.Ct. 588, 589-590 (1921) holds that general maritime law does not preempt state sovereign immunity.

In the absence of any preemptive federal statute and in the presence of the state sovereign immunity bar over general maritime law, the issue becomes, "To what extent does the Texas Tort Claims Act waive sovereign immunity?" The Texas Supreme Court is the ultimate interpreter of its own state statute. The Texas Supreme Court in its opinion explains how and why the Texas Tort Claims Act applies comparative responsibility negligence principles, and not pure comparative negligence principles.

This case simply involves a state supreme court interpreting its own state statute. No federal question exists. Therefore, this Honorable United States Supreme Court has no jurisdiction under 28 U.S.C.A. Section 1257(a) and has no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Argument

It is a fundamental tenet of law that when a state waives sovereign immunity, the state is free to limit the terms of the consent to be sued. This United States Supreme Court in the case of Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 53-54, 64 S.Ct. 873, 876, 88 L.Ed. 1121 (1944) directly states this point of law as follows:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure. (cites omitted.). (emphasis added.).

It is a fundamental tenet of law, that in order to abrogate state sovereign immunity, Congress must make this intention unmistakably clear in the language of any statute enacted by Congress. This Honorable United States Supreme Court in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147-3148, 87 L.Ed.2d 171 (1985) directly addresses this issue as follows:

> Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and

> inferences from general statutory language. **To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.** *Pennhurst II, supra,* 465 U.S., at 99, 104 S.Ct., at 907; *Quern v. Jordan, supra,* 440 U.S., at 342-345, 99 S.Ct., at 1145-1147. We decline to do so, **and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.** (emphasis added.).

In the case at bar, there is no federal statute preempting the application of Texas comparative responsibility negligence principles. There is also no federal case law that preempts the application of Texas comparative responsibility negligence principles. Quite to the contrary, state sovereign immunity bars general maritime law. This Honorable United States Supreme Court in the case of Ex parte New York, No. 1, 256 U.S. 490, 497-499, 41 S.Ct. 588, 589-590 (1921) states the following:

> It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

In the absence of any preemptive federal statute and in the presence of the state sovereign immunity bar over general maritime law, the issue becomes, "To what extent does the Texas Tort Claims Act waive state sovereign immunity?" In

the case at bar the Texas Tort Claims Act specifically conditions and limits Petitioners' right of recovery to situations where the employee would be personally liable to the claimant **according to Texas law.** Texas law pursuant to Section 33.001(a) of the Texas Civil Practices and Remedies Code precludes recovery by a claimant who is more that fifty percent (50%) negligent. In the case at bar, the jury found the claimant to be sixty percent (60%) negligent.

The Texas Supreme Court in explaining the Texas Tort Claims Act states the following in its opinion:

> Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:
>
> > Section 101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage...proximately caused by...the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; and (B) the employee would be personally liable...*according to Texas law.*
> >
> > Section 101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
> >
> > TEX. CIV. PRAC. & REM. CODE Sections 101.021, 101.025 (emphasis added [in original.]).

> This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law.

The Texas Supreme Court is the ultimate interpreter of the limits and conditions of the Texas Tort Claims Act for the purpose of determining the extent to which the State of Texas has waived sovereign immunity in the case at bar. The Texas Supreme Court in its opinion explains that the conditions and limitations of the waiver of sovereign immunity by the State of Texas through the Texas Tort Claims Act is only to the extent liability is imposed on an individual by Texas law. Texas law employs comparative responsibility negligence principles, not the pure comparative negligence principles of maritime law.

The Texas Supreme Court has simply interpreted a state statute. No federal question exists. Petitioners are simply dissatisfied with the interpretation of a state statute by a state supreme court. Because no federal question exists, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Because no federal question exists, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Therefore, this Honorable United States Supreme Court is without jurisdiction of the case at bar.

Petitioners cite and discuss several cases for the proposition that federal maritime pure comparative negligence principles control in the case at bar. **None of the cases cited or discussed in support of Petitioners' assertion vitiates a State's right to limit its waiver of sovereign immunity through a state statute.** This distinction is critical. Because the State of Texas has sovereign immunity, the State of Texas is liable only to the extent that it has waived sovereign immunity. The Texas Supreme Court has interpreted the Texas Tort Claims Act to preclude a recovery based upon maritime pure comparative negligence principles, because the waiver of

sovereign immunity under the Act is only to the extent liability is imposed on an individual by Texas law. Texas law employs comparative responsibility negligence principles. Pursuant to Texas law, the Petitioners are barred from recovery because the Petitioners were found to be more than fifty percent (50%) negligent by the jury.

Additionally, no conflict involving a federal question exists between this opinion of the Texas Supreme Court and previous opinions by various federal courts. Petitioners claim that the opinion of the Texas Supreme Court conflicts with Kamani v. Port of Houston Authority, 702 F.2d 612 (1983). Quite to the contrary, the opinion of the Texas Supreme Court is consistent with Kamani. The legal issue in Kamani was whether the Texas two year statute of limitations applied or whether the federal three year statute of limitations applied in a maritime injury suit filed pursuant to the Texas Tort Claims Act. In addressing this issue the Fifth Circuit Court of Appeals in Kamani states the following:

> Our recent decision in *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture, in a Cause of Salvage, Civil and Maritime*, 695 F.2d 893 (5th Cir. 1983), raises considerable doubt as to a conclusion that the state limitations statute automatically is applicable **without any specific indication contained within the statute itself.** (emphasis added.).

Unlike Platoro and Kamani, in the case at bar the Texas Tort Claims Act does contain language specifically indicating the extent of recovery under the Texas Tort Claims Act. As the Texas Supreme Court states in its opinion:

Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:

> Section 101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage...proximately caused by...the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; *and* (B) the employee would be personally liable...*according to Texas law.*
>
> Section 101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
>
> TEX. CIV. PRAC. & REM. CODE Sections 101.021, 101.025 (emphasis added [in original.]).

The opinion of the Texas Supreme Court is consisted with Platoro and Kamani. No conflict with federal authority exists.

Petitioners are attempting to select certain benefits from the Texas Tort Claims Act. Petitioners state on page three of their petition, "The Dopyeras alleged that the Department negligently operated and maintained the motor-driven bridge and brought suit under the Texas Tort Claims Act." At the same time, Petitioners are attempting to select the benefits of pure comparative negligence principles from general maritime law,

which are directly contrary to the express limitations of the Texas Tort Claims Act.

Petitioners' attempt to select certain benefits under the Texas Tort Claims Act and simultaneous attempt to select certain benefits under general maritime law have been expressly prohibited by this United States Supreme Court in the case of Tungus v. Skovgaard, 358 U.S. 588, 591-592, 79 S.Ct. 503, 506 (1959). This United States Supreme Court in Tungus states the following:

> The respondent asks us to uphold the interpretation which the majority in the Court of Appeals has put upon the New Jersey statute. Failing that, a much broader alternative argument is advanced--that a court in a case such as this may disregard completely the conditions which the State has put upon the right it has created, and may apply instead the full *corpus* of the maritime law, free of any qualifications imposed by the State. If death occurs upon navigable waters within a State, the argument runs, the law should seize only upon the blunt fact that there is some kind of state statute providing some kind of a right of action for death caused by some kind of tortious conduct. That, it is said, is enough to fill the "void" in the maritime law, which then becomes applicable in all its facets, without further inquiry as to what it is that the State has actually enacted.
>
> **This broad argument must be rejected.** The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. This is what was decided in The

> Harrisburg, where the Court's language was unmistakable: "* * * **[I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."** 119 U.S. 199, at page 214, 7 S.Ct. 140, at page 147. That is the doctrine which has been reiterated by the Court through the years. (cites omitted.). (emphasis added.).

A careful and complete reading of Petitioners' Petition for Writ of Certiorari reveals that Petitioners are foisting the very same argument that has been expressly rejected by this Honorable United States Supreme Court in Tungus. In addition to the fact that no federal question exists in this case, this Honorable United States Supreme Court should also refuse Petitioners' Petition for Writ of Certiorari because Petitioners request relief to which they are not entitled as a matter of law.

Lastly, Petitioners on page twelve of their Petition of Writ for Certiorari state:

> Although the waiver of immunity in *Platoro* involved a legislative waiver, since both *Kamani* and *Mifsud* have held that the TTCA applies to admiralty actions, federal admiralty law clearly applies where it conflicts with state law, as in the instant case.

However, Petitioners have misstated the holdings of those cases. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Respondent has a duty and obligation to reveal that this is a misstatement of the law. A complete reading of the Platoro, Kamani, and Mifsud v.

Palisades Geophysical Institute, Inc., 484 F. Supp. 159 (S.D.Tex. - Houston Div. 1980) cases reveals absolutely no authority that vitiates a State's right to limit its waiver of sovereign immunity through a state statute. As the Texas Supreme Court says in its opinion, the Texas Tort Claims Act specifically indicates that recovery under the Act exists "...only to the extent liability is imposed on an individual **by Texas law.**" (emphasis added.).

Furthermore, the extent of Petitioners' misstatement is revealed by the opinion of the Texas Supreme Court as follows:

> The threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law. While this is not an Eleventh Amendment case, the Supreme Court long ago addressed and resolved this issue in an Eleventh Amendment context. In *Ex parte New York, No. 1*, 256 U.S. 490 (1921), it was argued that the Eleventh Amendment's immunity refers only to suits "in law or equity," and that suits "in admiralty" could therefore be brought against the states. The Court rejected that argument, reasoning that the Eleventh Amendment is but a recognition of the fundamental principle that a state may not be sued without its consent and that admiralty and maritime jurisdiction was not exempt from that principle. *Ex parte New York, No. 1*, 256 U.S. 490, 497-99 (1921). Further, responding to the argument that allowing a state immunity would destroy the "symmetry and uniformity" of maritime law, the Court wrote:
>
> > It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit

> of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.
>
> *Id. at 503.*

Although state sovereign immunity is not absolute, the Supreme Court has usually required a "clear statement" or "unequivocal expression" of intent to abrogate the immunity in a *statute*. In the maritime law area, the Court held that the Jones Act abrogated state sovereign immunity. In the plurality and concurring opinions in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court held that, as to the Jones Act, a state retains sovereign immunity against suits by its own citizens in federal courts unless it has waived its immunity. The Court subsequently limited *Welch* to its Eleventh Amendment holding, indicating that the Jones Act still does abrogate state sovereign immunity. All the preemption holdings involve intent expressed in a specific statute. There is no suggestion that the holding of *Ex parte New York, No. 1*, that general maritime law does *not* preempt, is not good law.

> We conclude that maritime law does not preempt state sovereign immunity in this cause. First, this is a claim for property damage under general maritime law, *see Reliable Transfer*, 421 U.S. at 411, and not a statutory action for personal injury; **the Dopyeras rely on no federal statute to support their claim. Since there is no statute with a clear expression of congressional intent to abrogate state sovereign immunity, we must not imply one. Second, the last Supreme Court opinion addressing the issue is *Ex parte New York, No. 1*, which held that general maritime law does not preempt state sovereign immunity.** (emphasis in bold added.).

Obviously in the case at bar, general federal admiralty law is barred by state sovereign immunity. The defendant in this case at trial was Respondent, the State of Texas. Sovereign immunity has been waived in the case at bar only to the extent the Texas Tort Claims Act waives sovereign immunity. The Texas Supreme Court is the ultimate authority in interpreting its own state statute. The Texas Supreme Court in its opinion states that the Texas Tort Claims Act specifically indicates that, "This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law." Texas law employs comparative responsibility negligence principles. Pursuant to Texas law, the Petitioner is barred from recovery, because Petitioner was found to be more that fifty percent (50%) negligent by the jury.

CONCLUSION

This case simply involves an interpretation of a state statute by a state supreme court. No federal question is presented. Petitioners are merely dissatisfied with the interpretation of the Texas statute by the Texas Supreme Court. No conflict with federal authority involving a federal question is presented. Furthermore, since no federal question exists, no conflict with federal authority involving a federal question can exist. Therefore, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Therefore, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

This case presents no novel procedural or constitutional questions. Therefore, no jurisdiction under 28 U.S.C.A. Section 1257(a) exists. Therefore, no jurisdiction under Rule 10 of the Rules of the Supreme Court of the United States exists. Because no jurisdiction exists, this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari.

Additionally this Honorable United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari, because Petitioners attempt to select certain benefits under the Texas Tort Claims Act and simultaneously attempt to select certain benefits under general maritime law, that are in direct conflict with the Texas Tort Claims Act. **Petitioners' attempt to select is in direct violation of this United States Supreme Court's opinion of Tungus v. Skovgaard, 358 U.S. 588, 591-592, 79 S.Ct. 503, 506 (1959).**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response of the Texas Department of Transportation was served to counsel for all parties required to be served in compliance with Rule 29 of the Rules of the Supreme Court of The United States by certified mail, return receipt requested on this the _____ day of October, 1992.

_____
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APPENDIX A
IN THE SUPREME COURT OF TEXAS

No. D-0692

THE STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, PETITIONER

v.

EMIL DOPYERA, ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

OPINION

The issue in this case is whether federal maritime law preempts state sovereign immunity law to require application of maritime's pure comparative negligence principles to an accident at a state-operated drawbridge. The trial court awarded damages under the maritime rule and the court of appeals affirmed. The court of appeals apparently concluded the State of Texas had waived its sovereign immunity and that federal maritime law preempted state law. 799 S.W.2nd 469. We hold the State has not waived its immunity an that Congress did not intend for maritime law to preempt a state's sovereign immunity law in this manner. We reverse the judgment of the lower courts and render judgment for the State.

The Dopyeras sued for property damage resulting from the collision of their charter yacht with a drawbridge owned and operated by the Texas State Department of Highways and Public Transportation.[1] The Dopyeras, alleging the Department negligently operated an maintained the motor-driven bridge, brought suit under the Texas Tort Claims Act.[2] The State raised affirmative defenses of sovereign immunity and contributory negligence.

Trial was to a jury, which found the Dopyeras 60% at fault, the Sate 40% at fault, and total damages of $130,000. The Dopyeras moved for judgment on the verdict, seeking for the first time application of the federal maritime remedy of pure comparative negligence. Texas law as expressed in its comparative responsibility statute provides that in a negligence action, a claimant may recover only if his percentage of responsibility is no more than 50 percent. TEX. CIV. PRAC. & REM.CODE ANN. § 33.001(a) (Vernon Supp. 1991). The trail court applied the maritime rule and awarded the Dopyeras 40% of the damages, or $52,000, plus interest and costs. The Court of appeals affirmed, concluding the State waived its immunity, the federal maritime remedy applied, and the Dopyeras' contributory negligence could only mitigate, not bar, the damage award. 799 S.W.2d 469.

Generally, admiralty jurisdiction extends to vessels on navigable waters, and any tort occurring on those waters and bearing a significant relationship to traditional maritime activity is governed by maritime law. *McCormick V. United State,* 680 F.2d 345, 347 (5th Cir. 1982). A maritime tort claim may be brought in state court pursuant to the "saving to suitors" clause

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[1] While the case was pending on appeal the legislature renamed the agency the Department of Transportation.

[2] TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. Before codification as chapter 101 of the Civil Practice and Remedies Code, the Tort Claims Act was article 6252-19 of the Revised Civil Statues.

in 28 U.S.C. § 1333 (1986). *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 22-223 (1986)(state courts are constrained by "reverse-Erie doctrine" which requires that substantive state remedies conform to federal maritime standards.) If maritime interests are involved, there is a strong policy to apply uniform rules of maritime conduct and liability to promote and protect maritime commerce. *Pope & Talbot v Hawn,* 346 U.S. 406 (1953).

In the instant case, the court of appeals concluded that maritime law covered the Dopyeras' vessel operating in navigable waters, and that federal law preempted state law. Under federal maritime law's pure comparative negligence standard, when a vessel's captain and one or more other parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is allocated among the parties proportionately to their comparative degree of fault. *Unites States v. Reliable Transfer Co.,* 421 U.S. 397,411 (1795). The court of appeals emphasized the need for a uniform and consistent maritime law system, and the incompatibility of Texas comparative responsibility rule with admiralty's pure comparative rule.

The court of appeals erred by failing to give proper weight to the State's interest in its own sovereign immunity by concluding that federal law preempted the State's limitations on its consent to be sued. Congress has expressed no clear intent to abrogate state sovereign immunity and impose general maritime law on the states for property damage. Moreover, the State's limited waiver of immunity under its Tort Claims Act permits imposition of only the state remedy, and does not allow the broader federal maritime remedy of pure comparative fault.

The threshold issue is whether the constitutional grant of maritime jurisdiction to the federal government itself preempted state sovereign immunity law. While this is not an Eleventh Amendment case, the Supreme Court long ago addressed and resolved this issue in an Eleventh Amendment context. In *Ex*

parte New York, No. 1, 256 U.S. 490 (1921), it was argued that the Eleventh Amendments immunity refers only to suits "in law or equity," a that suits "in admiralty" could therefore be brought against the states. The Court rejected that argument, reasoning that the Eleventh Amendment is but a recognition of the fundamental principle that a state may not be sued without its consent and that admiralty and maritime jurisdiction was not exempt from that principle. *Ex parte New York, No. 1*, U.S. 490. 497-99 (1921). Further, responding to the argument that allowing a state immunity would destroy the "symmetry and uniformity" of maritime law, the Court wrote:

> It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.
>
> *Id.* at 503.

Although state sovereign immunity is not absolute,[3] the Supreme Court has usually required a "clear statement" or " unequivocal expression" of intent of abrogate the immunity in a statute.[4] In the maritime law area, the Court held that the Jones Act[5] abrogated state sovereign immunity.[6] In the plurality and

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[3] *See, e.g. Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)(congressional abrogation of state immunity, pursuant to commerce clause powers); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)(congressional abrogation of state immunity pursuant to enforcement power of section of fourteenth Amendment).

[4] *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); *Edelman v. Jordan* 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973).

[5] 46 U.S.C. App § 688.

concurring opinions in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court held that, as to the Jones Act, a state retains sovereign immunity against suits by its own citizens in federal courts unless it has waived its immunity. The court subsequently limited Welch to its Eleventh Amendment holding, indicating that the Jones Act still does abrogate state sovereign immunity.[7] All the preemption holdings involve intent expressed in a specific statute. There is no suggestion that the holding of *Ex parte New York No. 1*, that general maritime law does *not* preempt, is not good law.

We conclude that maritime law does not preempt state sovereign immunity in this cause. First, this is a claim for property damage under general maritime law, *see Reliable Transfer,* 421 U.S. at 411, and not a statutory action for personal injury; the Dopyeras rely on no federal statute to support their claim. Since there is no statute with a clear expression of congressional intent to abrogate state sovereign immunity, we must not imply one. Second, the last Supreme Court opinion addressing the issue is *Ex parte New York, No. 1*, which held that general maritime law does not preempt state sovereign immunity.

The issue remains whether Texas itself waived immunity and consented to general maritime law jurisdiction in this cause. If this court concluded waiver was intended the federal courts apparently would defer to that determination. *Welch*, 483 U.S. at 474 (opinion of Powell, Jr.). At least for purposes of Eleventh Amendment construction, the Supreme

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[6] In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that in the Jones Act language ("Any seaman who shall suffer personal injury in the course of his employment") Congress intended to abrogate state immunity as to seamen employed by or injured by a state.

[7] *Hilton v. South Carolina Public Railways Commission*, ___U.S.___, 112 S.Ct. 560 (1991).

Court apparently requires the presence of an unequivocal expression before imposing a holding of waiver. *Port Authority Trans-Hudson Corp. v. Feeney,* 494 U.S ___,___ 110 S.Ct. 1868, 1873 (1990) (Waiver provisions in state act must meet same unmistakably clear standard as Congress's expression of intent to abrogate Eleventh Amendment sovereign immunity). For the reasons that follow, we conclude that under applicable federal construction rules, Texas has not waived it sovereign immunity to general maritime jurisdiction, and the State's limited waiver of sovereign immunity, under state rules of construction, insulates it from liability under the facts of this cause.

Texas is immune from tort liability except as waived under the Texas Tort Claims Act, which provides in relevant part:

> §101.021 Governmental Liability - A governmental unit in the state is liable for: (1) property damage... proximately caused by ... the negligence of an employee...if: (A) the damage arises from the operation or use of...motor driven equipment; *and* (B) the employee would be personally liable ... *according to Texas law.*
>
> §101.025 Waiver of Governmental Immunity: Permission to Sue - (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. (b) A [claimant] under this chapter may sue a governmental unit *for damages allowed by this chapter.*
>
> TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.025 (emphasis added).

This limited waiver of immunity permits suit against the sovereign only to the extent liability is imposed on an individual by Texas law. Once the plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause

of action against the State, then he also is bound by the limitations and remedies provided in the statute. *See Kamani v. Port of Houston,* 702 F.2d 612 616(5th Cir. 1983); *see also Riggle v. State of California,* 577 F.2d 579, 585-86 (9th Cir. 1978). The state is free to limit damages and lability to the terms of its waiver of sovereign immunity, even if the general maritime law conflicts with the liability limitations of the Tort Claims Act. *Trinity River Authority v. Williams,* 689 S.W.2d 883, 886(Tex. 1985). In a cause of action against the State of Texas for property damage resulting from the operation of motor-driven equipment owned and operated by the State, the relief available is limited to that provided by Texas law, and in accordance with Texas' system for apportionment of fault. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon Supp. 1991).

We hold that the Dopyeras are bound by the express terms of the sovereign's limited consent to be sued. We reverse the judgment of the court of appeals and render judgment that the Dopyeras take nothing.

_____

Bob Gammage,
Justice

OPINION DELIVERED: July 1, 1992